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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1956.

No. 979 116

EDWIN H. EGGLETON, JR., - - - Petitioner,

versus

UNITED STATES OF AMERICA, - - Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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UNITED STATES OF AMERICA, - - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Edwin H. Eggleton, Jr., respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit entered December 3, 1955. The opinion appears in 227 F. 2d 493. A copy is appended. The District Court did not file an opinion.

A petition for rehearing was denied by the appellate Court on March 30, 1956.

Page references made herein are made, unless otherwise indicated, to the Appendix for petitioner included in the transcript of the record.

The Honorable Justice Reed has extended the time to and including May 29, 1956 to file this petition.

A transcript of the record, as required by the rules of this Court accompanies this petition.

STATEMENT OF JURISDICTION.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1), Rules 21-33, of this Court and Rule 37 (C) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED.

1. Whether the Court erred in finding that the burden of proof was upon the defendant to sustain the propriety of deductions claimed in his tax return.

2. Whether the Court erred in permitting the prosecution to introduce in evidence for corroborating purposes, an incorrect net worth exhibit as evidence of a specific item case presented as fraud, when in truth, the correct net worth exhibit would only corroborate the deficiency in the tax return not the result of any fraudulent acts.

3. Whether the Court erred in permitting the prosecution to omit as part of its evidence known causes of deficiency because they were not the result of fraud, and which resulted in a similar deficiency by a net worth comparison, in order to cause a jury to believe that the net worth corroborated its purported fraudulent omissions.

4. Whether the Court erred in permitting the prosecution to omit as part of its evidence the existence of cash sums included in the defendant's income sufficient to provide for the deductions in defendant's return, which the prosecution claimed were fraudulent deductions.

5. Having permitted the shifting of the burden of introducing proof as to the flow of cash claimed as a tax deduction into taxable income, to the defendant, did the Court then err in holding that the additional burden of proving that this same cash was not expended for living expenses or invested in an undisclosed asset, was also upon the defendant.

6. Whether the Court erred in denying defendant's motion for a bill of particulars where an indictment gives no information whatsoever as to the prosecution's case.

7. Whether the Court erred in instructing the jury with respect to a net worth statement that "the rule of law is that it alone will uphold a conviction as testimony," and "many people regard it (a net worth) as the most satisfactory of all evidence."

STATEMENT.

It cannot reasonably be said that the facts relating to a tax case can be presented without the submission of figures.

On May 28, 1954, Edwin H. Eggleton, Jr. was found guilty by a jury under one count of an indictment charging him with violation of Section 145 (b), In-

ternal Revenue Code; 26 U.S.C., Section 145 (b); of wilfully and knowingly attempting to defeat and evade a large part of his federal income tax liability for the calendar year 1947 (8a, 11a). At the same time, the jury found the defendant not guilty of a similar charge for the calendar year 1948 (8a).

On June 4, 1954, the Court sentenced petitioner to prison for a period of one year and fined him $5,000.00 plus costs. The financial condition of the petitioner made it impossible to pay the fine imposed because of a jeopardy assessment previously imposed by the Bureau of Internal Revenue. The fine was reduced to $2,500.00 and $750.00 court costs, with the payment of the remaining fine to be made when and if the jeopardy assessment deficiency allows such payment.

During the middle part of the year 1945, petitioner became actively engaged in the purchase and sale of used cars, which business was continued to, and including, the year 1949; the petitioner's records having been examined for each of these years by Special Agents of the Internal Revenue Service.

During the two years covered by the indictment, petitioner, in his used car business, sold (and acquired) the following used cars:

460 Sales in 1947	460 acquisitions (approximately)
390 Sales in 1948	390 acquisitions (approximately)
850 total for 2 years	850 total for 2 years

The tax questions as to each of these 1,700 transactions involved:

(a) The price paid for the car.

(b) The amount expended on the car so that it could be resold.

(c) The price received for the car.

Therefore, as to each of the 1,700 transactions of least three figures were necessary, making a possible total of 5,100 different transactions.

The indictment under which the defendant was tried was in general terms and gave the defendant no inkling as to how many of the 5,100 transactions were involved, or how many of the figures were allegedly erroneous. The petitioner's motion for a bill of particulars was denied by the District Court (2a).

The prosecution's case centered principally around Government's Exhibit No. 312.

Exhibit No. 312 is 7 double pages in length and it *purports* to show as to 205 cars for the year 1947:

(a) The date of purchase.

(b) The price paid by check or from allowance on trade-in car.

(c) The date of purchase from defendant's records.

(d) The cost per car claimed by defendant.

(e) The excess cost claimed.

Each and every one of the alleged facts stated in Exhibit No. 312 could be obtained from the defendant's books, records and accounts (105a, 106a).

The Government's "specific item case" of fraud was as follows:

Government Exhibit No. 312, indicating a difference in cost of cars sold during 1947, captioned "Schedule of Excess Cost of Sales Claimed for 1947"	$19,892.52
Government Exhibit No. 521, pertaining to unreported sales	4,252.42
Government Exhibit No. 574, relating to unreported finance income	4,334.52
Total	$28,479.46
Less: overpayment resulting from inventory adjustment on 1947 federal return per testimony of Internal Revenue Agent John Taylor (122a), and Defendant's Exhibit No. 30	1,310.58
Total Specific Items of Deficiency	$27,168.88

For the avowed purpose of corroborating its "specific item case", the Government then introduced a net worth exhibit indicating a deficiency of $29,268.86, which the Government Agents testified as resulting in a deficiency in tax otherwise due as shown by their "specific item case."

A tabulation showing the reconciliation of the net taxable income as reported by defendant for the year 1947, and the correct net income as determined from his books and records, and an explanation of the various items of errors and omissions follows:

Net Income Per Defendant's 1947 Return (Government's Exhibit No. 1)			$14,229.60
(a) Errors resulting in addition of sales on defendant's records (net)		$3,273.00	
(b) Errors resulting from inclusion of beginning inventory—Mezksl Motors—floor planned and then duplicating cost of such cars when sold and paid for		5,134.42	
(c) Errors in adition of purchases from defendant's records:			
Understatements, November	$1,426.00		
Overstatements, March-April	1,576.00	150.00	
(d) Errors in addition of expenses from defendant's records (*Understatement*)		384.70 Cr.	
Mathematical errors (as contained in Defendant's Exhibit No. 7)		$8,172.72	
(e) Transfer by bank of portion of Finance Reserve to defendant's business bank account—Not included in defendant's taxable income (Government Exhibit No. 574) and (Defendant's Exhibit No. 30)		4,000.00	
(f) Finance Income—Associates Discount Corporation Deposited in business bank account but not included in defendant's taxable income (Government's Exhibit No. 574) and (Defendant's Exhibit No. 30)		334.52	
(g) Cost of repossessed cars charged to defendant's finance reserve at the bank but not included in defendant's taxable income (Defendant's Exhibit No. 30)		4,526.77	
(h) Inter-Company repair costs taken as deduction on one company's records but not included as offsetting income on other company (Defendant's Exhibit No. 30)		1,229.75	
(i) Understatement in sales of Mezksl Motors, testified by government witness—Internal Revenue Agent Taylor (121a)		1,470.00	
(j) Overstatement of income resulting from inventory adjustment on return (Defendant's Exhibit No. 30)		1,310.58 Cr.	
Total specific errors and omissions			$18,423.18
Defendant's net taxable income as corrected			$32,652.78

As indicated in the above explanations, these items represent an admitted deficiency for the year 1947, which was corroborated by petitioner's net worth statement.

The prosecution was well aware of the individual causes of deficiency enumerated above, yet chose to shift to petitioner the burden of introducing in evidence all but $3,023.94 of such errors. The remainder of $15,399.24 is not contended by the prosecution to be fraudulent. There is no explainable difference between the items introduced by the prosecution and the items omitted and none was offered by the prosecution.

As a check against the correctness of petitioner's books and records, there was submitted in evidence a net worth exhibit (defendant's Exhibit No. 37(2)), and included, as part of such net worth exhibit, an explanation of each and every error in the prosecution's net worth exhibit so that the prosecution would be fully appraised of the errors in their own net worth. The petitioner's net worth statement stands in the evidence as correct. The prosecution contended on appeal, and for the first time, that either the living expense item, or an undisclosed asset, or cash on hand, should be increased by the sum of $19,732.46, which is the amount of cash which has been included in the petitioner's taxable income and allowed as a deduction in the net worth exhibit of both the petitioner and the Government, but which was disallowed as a tax deduction in the prosecution's specific item case. The prosecution must have not less than this amount of additional net worth in order for a net worth exhibit to

corroborate any substantial portion of its specific item case as presented by its Exhibits No. 312 and 521.

Petitioner proved by a flow of cash that the additional sums added to the cost of cars by petitioner and claimed as a deduction in his return, was included in his taxable income and allowed as an expense by the Government in its own net worth exhibit. The evidence to this effect is summarized as follows:

Total receipts per petitioner's records		$484,056.
Less: Bank loans, return checks, etc.		65,396.
Total taxable receipts		$418,660.
Total disbursements per petitioner's records		$468,624.
Less: Repayment of bank loans, return checks, etc.		67,036.
Total		$401,588.
Less: Capital expenditures	$22,629.	
Personal living expenses	8,600.	31,229.
		$370,359.
Net income on a cash basis (before deduction of cash expenditures of $19,732. added to cost of cars by petitioner)		$ 48,301.
Adjustments to place cash basis income on an accrual basis		5,573.
Adjusted gross income		$ 53,874.
Less: Standard deduction		500.
Taxable net income *before* allowance for cash expenditures added to cost of cars by petitioner		$ 53,374.
Petitioner's net income as determined by Net Worth Exhibit		33,050.
Excess of petitioner's taxable income as contended by prosecution above taxable net income as corroborated by the net worth method		$ 20,324.

An understanding of the results of evidence submitted in a tax evasion proceedings is impossible without the submission of substantiating figures.

The above computations were included for the sole purpose of substantiating the fact that:

(a) The deductions claimed by the petitioner in his income tax return as cost of cars purchased for resale was not proved to be an overstatement of cost as contended by the prosecution through the use of a net worth exhibit submitted for corroborating purposes.

(b) The prosecution's failure to present in evidence the fact that cash sums included in petitioner's taxable income were sufficient to account for the deductions claimed to be fraudulent deductions through overstatement of cost of cars.

(c) The prosecution's failure to present in evidence the fact that there was a non-fraudulent deficiency in petitioner's income, which accounted for the bulge in his net worth, thereby shifting the burden of introducing this evidence to the petitioner, in violation of his substantial rights.

(d) The Court admitted in evidence an erroneous net worth exhibit for the purpose of corroborating the prosecution's specific item case for fraud, when actually a correct net worth corroborated that deficiency known by the prosecution *not* to be the result of fraud.

REASONS WHY THE WRIT SHOULD BE GRANTED.

1. The Court could and should have known that the denial of a Bill of Particulars would result in prejudicial surprise to petitioner. The Government correctly states that numerous conferences were afforded petitioner. Yet the Government does not contend that petitioner was at any time furnished any information as to the theory it intended to pursue in the presentation of its case, or as to which of the hundreds of petitioner's transactions would be presented as fraudulent, for such was not the case. So far as petitioner was concerned, the trial itself was the only means of acquainting himself with the Government's contentions.

The Supreme Court has consistently held that notice and reasonable opportunity to prepare the defense are essential elements of due process. Snyder v. Mass., 291 U. S. 97, 105, 78 L. Ed. 674, 678; Hovey v. Elliott, 167 U. S. 409; Missouri *ex rel.* v. North, 271 U. S. 40; Pennoyer v. Neff, 95 U. S. 714.

It is not the office of a Bill of Particulars to make a bad indictment good, but it may make the charges sufficiently definite to inform the accused with reasonable certainty what he is required to meet and thus satisfy essential requirements of due process. Floren v. U. S., 8th Cir, 186 F. 961; Dierkes v. U. S., 6th Cir., 274 F. 75, 79; O'Neill v. U. S., 19 F. 2d 322 (C. C. A. 8); U. S. v. Halsey Stuart & Co., 4 F. Supp. 662; U. S. v. Greve, 12 F. Supp. 372.

Granting or refusing a Bill of Particulars ordinarily rests in the sound discretion of the trial court, but the circumstances of the case may be such that a refusal to grant it will constitute reversible error. Billingsley v. U. S., 8th Cir., 16 F. 2d 754, 755; Filiatreau v. U. S., 6th Cir., 14 F. 2d 659; Van Dam v. U. S., 6th Cir., 23 F. 2d 235, 237; Peck v. U. S., 7th Cir., 65 F. 2d 59. This is such a case.

Before stating the additional reasons why petitioner believes this writ should be granted, it is believed that petitioner's case may be an unusual one in that it has the elements of a net worth defense. A net worth, if available for prosecution purposes, should be equally proper for the defense. This fact may account for the apparent failure of the Trial Court and Appellate Court to fully understand the errors contended for by petitioner.

The prosecution introduced in evidence petitioner's income tax return for the year 1947. This return included as a deduction from taxable income the sum of $19,892.52, representing what petitioner says was additional cost of cars purchased for resale above the bare purchase price of such cars. The prosecution having introduced this exculpatory fact, the burden of proof should be upon it to show that such claimed deductions were not proper and further that if improper resulted in an understatement of taxable income. No decision holding to the contrary was discovered after a diligent search of the authorities.

> "The prosecution by introducing in a criminal prosecution exculpatory statements of the defend-

> ant thereby raises a presumption in his favor that the exculpatory statements are true, which requires their falsity to be shown beyond a reasonable doubt" (20 Am. Jur. 1082).

But the prosecution's position, which was sustained on appeal, was that they have established their case by the mere showing of the initial cost of cars and the excess sums added by the petitioner and claimed as a tax deduction. The prosecution was permitted to introduce in evidence an incorrect net worth exhibit for the purpose of sustaining its contention that this resulted in a comparable deficiency in taxable income. After correction for errors, the bulge in petitioner's net worth was proven to be due to causes other than the deductions of the sums added to the cost of cars by petitioner and the purported profit from omitted sales.

As said by the United States Court of Appeals for the Seventh Circuit in U. S. v. Fenwick, 7 Cir., 177 Fed. 2d 488, 489:

> "In such a situation we must keep in mind that the conviction can not stand unless there is proof of the *corpus delecti,* existence of which can not be presumed or established by an extra-judicial admission. The Government must, by competent evidence, prove beyond reasonable doubt that the crime charged has actually been committed."

The Court erred in permitting the prosecution to introduce in evidence a net worth exhibit as corroborating evidence of its specific item case to the prejudice of petitioner's substantial rights as a citizen of the

United States. Petitioner's correct net worth corroborated the non-fraudulent omissions in his income tax returns. Additional net worth was required to substantiate any part of the prosecution's Exhibits 312 and 521. The Appellate Court found in its opinion that the additional net worth required could be supplied by *assuming* that the $19,732.46 of cash included in petitioner's income and allowed in the net worth exhibit had been diverted to petitioner's own use or secretly retained by him. The Appellate Court's specific finding was:

> "An accountant testifying on behalf of appellant stated that an analysis of appellant's books and his net worth, disclosed $19,732.46 'cash available' in the business; that if this amount of cash had not been used for expenses in the business, 'it would show up,' but that it did not appear in either a net worth statement prepared by the government, or a net worth statement submitted by appellant. From this, the accountant insisted that such sum of $19,73246 must have been expended by appellant in cash for costs of the vehicles in addition to the initial cost of the cars and the total costs deducted on the income tax return for repairs and parts. It is to be said, however, that such cash could have been diverted to appellant's own purposes and secretly retained by him."

This Court's opinion in Holland v. U. S., 348 U. S. 121, was cited by the Fifth Circuit in Demetree v. U. S., 5 Cir., 207 F. 2d 892. In speaking of the submission of a case to a jury, where ordinary rules of proof have been relaxed, if not disregarded, that Court said, page 894:

"This kind of latitudinous allowance of the admission and use of conclusions as evidence and the submission of the case to the jury without a scrupulous adherence to the theory, has resulted in a tendency to accept, if not in the complete acceptance of, the idea that in a case tried by this method, ordinary rules of proof may be relaxed if not disregarded. Further and more prejudicial to a defendant, there has grown up a kind of ancillary theory that the government, by introducing proof of deposits, expenditures, etc., having put up what it calls a prima facie case, the defendant finds himself jockeyed out of the position the law affords him, of insisting that the government establish his guilt by legal and credible evidence beyond a reasonable doubt. This is accomplished by requiring him to prove himself innocent by assuming the burden of overcoming the prejudicial effect of the mass of exhibits, estimates, conjectures, and conclusions which the government has been allowed to get into the record, upon the apparent theory that it is up to the defendant to explain all of it away as part of his burden to prove his innocence."

This Court has not sanctioned the use of the net worth method which contains assumptions of additional net worth. To do so would place upon a defendant the impossible task of proving the absence of either additional living expenses or assets below that theorized by the prosecution. This Court has held that the standards of accuracy required of a net worth statement in a criminal case are high.

In discussing the use of the net worth method this Court, in the Holland case, *supra*, while pointing out

that the Government deems the method useful in the enforcement of the criminal sanctions of our income tax laws, said:

> "Nevertheless careful study indicates that it is so fraught with danger for the innocent that the courts must closely scrutinize its use."

This is such a case.

In commenting on the net worth method of reconstructing taxable income, the 5th Circuit in Bryan v. Commission, 209 Fed. 2d 823 (a civil fraud case), aptly said, page 826:

> "We share taxpayer's lack of enthusiasm for the net worth method of reconstructing taxable income. At best, it is subject to the criticism that when heedlessly resorted to and loosely applied it is dangerous and inexorable. In all cases, civil and criminal, it should be applied with the utmost caution to avoid injustices to honest taxpayers which might otherwise result."

If we correctly interpret this Court's opinion in Daniel Smith v. U. S., 348 U. S. 147, where a net worth statement is used as corroborative evidence it must implicate the accused in order to show that a crime has been committed.

The prosecution omitted from its evidence the fact that errors totaling $15,399.24 were made in preparing petitioner's tax return, by his bookkeeper. There is no contention by the prosecution that this amount of the deficiency is fraudulent. Additional errors totaling $3,023.94, and although indistinguishable from other errors comprising those omitted from its evidence,

were contended as fraudulent by the prosecution on appeal.

It cannot be rightly said that these errors in petitioner's return, known by the prosecution, were a proper question for the jury's consideration. Yet the Appellate Court in its opinion says:

> "The net worth statement, indicating unreported income of $29,268.86, was introduced to corroborate the government's proofs on the trial of specific items of unreported income—and, in fact, a large amount of unreported income is admitted by appellant. Of course, he claims that, in this regard, the evidence negatives his willfulness in failing to report such income. This contention, however, presented a question for the jury; and it cannot be said that the admission of the net worth statement, under the foregoing circumstances, resulted in prejudicial error."

As to the "Cash Available" of $19,732.46, it was essential to defendant's right to a fair trial that the jury did not have to reach a decision as to whether or not defendant had the cash available during the taxable year, which he testified he expended on cars purchased for resale and which he caused to be added to the bare purchase cost of such cars. The availability of almost the exact amount of cash added to the bare cost of cars by defendant is admitted by the Government and is not—and should never have been—an issue of fact to be decided by the jury. Because the prosecution chose to omit this essential information from its evidence, the burden of proof as to its existence was left solely to defendant.

As the Government has said, in its memorandum to the Trial Court: ". . . the funds could have been disbursed for personal living expenses or for the acquisition of unknown assets" (213a—Appendix to Appellant's Brief).

This Court, in its opinion, adopted this view as its own when it says:

> "It is to be said, however, that such cash could have been diverted to appellant's own purposes and secretly retained by him."

The undisputed proven fact of the flow of this cash into defendant's income should not have prompted the Court to find that defendant must prove that it was not "diverted to appellant's own purposes and secretly retained by him".

The burden of proof as to these important facts was intentionally placed upon defendant—the only result of which could have been the denial to him of his right to a fair trial. Petitioner believes that this Court meant what it said in the Holland case, *supra,* under the caption "The Government's Investigation of Leads; . . . that is, it is the Government's duty to introduce all relevant evidence including that obtainable from leads reasonably susceptible of being checked, this being consistent with the Government's duty not convict, but to see that justice is done."

It cannot be rightly said that this evidence was not relevant to defendant's right to a fair trial, for the evidence shows that the introduction of these two important facts was indispensable to his defense.

The law with respect to criminal fraud does not permit the Government to intentionally shift the burden of proof from itself to a taxpayer. Such a shifting would deny the taxpayer his right to a fair trial as was proven in petitioner's case. The Government's case is aided to a substantial degree in the minds of a jury by virtue of the indictment itself.

If we are to be realistic, we must recognize that there is an occasional case in which the Government people have become so blindly convinced of guilt that any evidence to the contrary is thought of as a fabrication or technicality which must be demolished so that justice can triumph. The increased number of indictments for tax evasion (1,475 in 1955 resulting in 1,378 convictions) makes apparent the need for careful scrutiny by the Courts of the prosecution's methods to obtain convictions.

If any doubt exists as to whether the evidence withheld by the prosecution is essential to defendant's right to a fair trial ". . . justice requires that doubt be weighed in favor of the defense" (U. S. v. Schneiderman, (D. C. S. D. Cal.) 106 F. Supp. 731, p. 736).

The United States Attorney is under an obligation to the citizenry which he serves to see that his rights are protected in a criminal trial. Berger v. U. S., 295 U. S. 78, 55 S. Ct. 629; Ross v. U. S., 6 Cir., 180 Fed. 2d 160.

PRAYER.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the Court of Appeals for the Sixth Judicial Circuit, commanding that Court to certify and send to this Court for its review and determination on the day certain to be therein named, a full and complete transcript of the record and proceedings in the case entitled on its docket, Edwin H. Eggleton, Jr., Appellant, v. The United States of America, Appellee, No. 12,366, to the end that said case may be reviewed and determined by this Court as provided by 28 U. S. C., Sec. 1254, and the applicable rules promulgated by this Court governing applications for certiorari in criminal cases, and that the judgment of the Court of Appeals be reversed by this Honorable Court, and that petitioner may have such other and further relief in the premises as to this Honorable Court may seem right and proper.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 116

EDWIN F. EGGLETON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals is reported at 227 F. 2d 493.

JURISDICTION

The judgment of the Court of Appeals was entered on December 3, 1955, and a petition for rehearing was denied on March 30, 1956. 227 F. 2d 493. On April 30, 1956, the time for filing a petition for a writ of certiorari was extended by order of Mr. Jusice Reed to May 29, 1956. The petition was filed on May 26, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the District Court abused its discretion in its denial of petitioner's request for a bill of particulars.

2. Whether the District Court committed reversible error by admitting into evidence the Government's net worth statement.

3. Whether the evidence was sufficient to sustain the jury's verdict.

STATUTE INVOLVED

Internal Revenue Code of 1939, 26 U. S. C. 145 (1952 ed.):

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfuly attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

STATEMENT

On March 5, 1954, a two-count indictment was filed against petitioner in the United States District Court for the Western District of Kentucky, charging that

he had willfully attempted to evade and defeat his income taxes for the years 1947 and 1948 by filing false and fraudulent tax returns, in violation of Section 145 (b) of the Internal Revenue Code of 1939. The indictment alleged that he had reported an income tax liability of $3,132.17 for 1947 and $3,178.58 for 1948, whereas his correct tax liability for those years was $19,851.40 and $4,280.82, respectively. (R. 4a, 11a–13a.)

After a jury trial lasting nine days, petitioner was found guilty on Count One and not guilty on Count Two (R. 6a–8a) and was sentenced to imprisonment for a period of one year and one day and fined $5,000 and costs (R. 9a, 215a). On appeal, the Court of Appeals affirmed unanimously. 227 F. 2d 493.

The evidence to support the verdict may be summarized as follows:

In 1945, petitioner started in the business of buying and selling used cars, operating as a sole proprietorship under the name of Dealers Used Car Corner. (R. 23a, 25a.) Petitioner employed his brother-in-law to keep his books and prepare his income tax returns. (R. 170a.) When petitioner's books were examined by the Treasury agents for the year 1947, it was found that the cost of cars had not been limited to the amount of the initial purchase price, but included other sums for which there were no supporting checks or invoices. These sums, which were recorded on cards, were changed from time to time at petitioner's behest. In addition, a reasonably accurate and permanent account of repairs and parts was main-

tained separately in petitioner's books. (R. 125a–126a, 176a–177a, 179a; R. 10b–12b, 17b–18b.)

At a conference on May 15, 1953, petitioner made a statement to the effect that the overstatement of costs on these automobiles was due to his having purchased cars at prices over and above the ceiling set out by OPA regulations. (R. 54b–55b.) As will be seen (*infra,* p. 5), he later contended that this amount was expended for locator fees, "bird-dog" fees, and other expenditures to put the automobiles in condition for resale.

At the trial, the Government established by direct evidence of specific items that petitioner's income tax return for 1947 had understated sales in the sum of $4,252.52 and had understated financing income in the amount of $4,334.52. (R. 96a, 102a; R. 17b, 24b–25b, 50b, 65b, 66b.) On the same return, petitioner took a deduction in the sum of $9,677.67 as expenditures for repairs. This figure was allowed as being reasonably accurate. (R. 151a R. 10b, 17b.) However, he also deducted as a cost of cars a figure which the Government showed to exceed the purchase prices by $19,892.42. (R. 4b-21b, 67b–72b.) After allowing $1,310.58 for an inventory adjustment (Pet. 6, R. 122a; R. 64b), petitioner's *unreported* income, insofar as it was thus established, was shown to total $27,168.88, as contrasted with the reported amount of $14,229.60. The Government also showed that petitioner's 1947 unreported income based on his net worth increase and non-deductible expenditures amounted to $29,268.86. (R. 122a, 123a; R. 63b–64b.) The trial court limited the jury's consideration of the

net worth computations, explaining that it was admitted only as corroboration of the results reached by the direct evidence of specific items. (R. 202a, 208a.)

Petitioner testified that his brother-in-law had full knowledge of a $4,000 item of financing income and that it was his brother-in-law's fault that this sum was not reported. (R. 24b–25b, 26b.) He also contended that the cost of automobiles claimed in his 1947 return was not padded. (R. 125a.) In this regard, certain defense witnesses testified to a practice among used car dealers of paying $25 to $50 cash per vehicle as locator fees and "bird-dog" fees, i. e., commissions to persons who furnished information leading to individual sellers and buyers of used cars. (R. 130a, 137a–138a, 142a–143a.) Although petitioner had no invoices or other records evidencing any such payments (R. 175a–177a; R. 45b–46b), George Krauser, Jr., an accountant, testified that during 1947 petitioner had acquired $19,732.46 in cash which he *could* have spent for such business purposes (R. 145a–149a, 183a). Krauser also testified that according to his calculations petitioner had underreported his 1947 income by $17,146.39, all as the result of "mathematical errors." (R. 148a–149a; cf. R. 181a–182a.)

ARGUMENT

1. Petitioner contends (Pet. 11–12) that the denial of his motion for a bill of particulars resulted in "prejudicial surprise." It is doubtful that the point has been preserved. During the trial there was no claim of surprise nor any request for a continuance, and in his motion for new trial (R. 185a–186a) peti-

tioner did not assign the point as error. In any event, the record shows that prior to indictment a number of conferences were held at which petitioner and his representatives compared net worth figures with the investigating agents and discussed the overstated costs and the unreported sales (R. 43b–45b, 53b–56b.) The items making up petitioner's net worth and the specific items of padded expenses and unreported income, moreover, were all matters peculiarly within his own knowledge. Under these circumstances, there was plainly no obligation on the Government to disclose to him in advance all the details of its evidence, which is virtually what the motion (R. 19a–20a) called for.

Even if petitioner had not been as fully informed of the Government's case as he was, the denial of his motion would not constitute error. *Remmer* v. *United States*, 205 F. 2d 277, 281–282 (C. A. 9th), judgment vacated and remanded on other grounds, 347 U. S. 227; *Demetree* v. *United States*, 207 F. 2d 892, 894–895 (C. A. 5th); *Rose* v. *United States*, 128 F. 2d 622, 624–625 (C. A. 10th), certiorari denied, 317 U. S. 651; *United States* v. *Skidmore*, 123 F. 2d 604, 607 (C. A. 7th), certiorari denied, 315 U. S. 800; *Maxfield* v. *United States*, 152 F. 2d 593, 596 (C. A. 9th); cf. *United States* v. *Caserta*, 199 F. 2d 905, 910 (C. A. 3d). The granting of a motion for a bill of particulars rests within the discretion of the trial court (*Wong Tai* v. *United States*, 273 U. S. 77, 82), and there was clearly no abuse of discretion in this case, for petitioner has entirely failed to show that he was hurt by denial of the motion.

2. Petitioner contends (Pet. 13–17) that the trial court erred in admitting into evidence (in corroboration of the result reached by direct evidence of unreported net income) the Government's reconstruction of his net income by the net worth-expenditures method (R. 63b–64b). Petitioner's arguments, as we understand them, are that the statement should not have been admitted because (1) it is erroneous and (2) it takes into account items of unreported income that were "non-fraudulent." Aside from the obvious answer that these arguments go to the weight of the exhibit rather than to its admissibility, petitioner fails to show wherein it is erroneous or why the jury must be deemed to have regarded some of the unreported income as "non-fraudulent."

Petitioner relies (Pet. 8) upon his own version of his net worth (Deft. Ex. 37 (2)) as being correct, but has failed to include that exhibit in the record so that the Court might compare it with the Government's reconstruction. Nowhere, indeed, does petitioner attempt to point out any specific error in the Government's summary of his net worth. He argues merely that it does not fully corroborate the correctness of the Government's contention that his purchase costs were padded to the extent of $19,892.42 (*supra*, pp. 3–4) because it takes into account unreported income of $15,399.24 (Pet. 7, 16) resulting from "non-fraudulent" errors by the bookkeeper. The most striking fact about these "errors" (Pet. 7) is that, with minor exceptions, they are overwhelmingly in petitioner's favor. Certainly there is no warrant, in the face of the verdict, for assuming that the jury regarded such flagrant distor-

tions of income as unknown to the petitioner at the time he filed his tax return. Whatever the culpability of the bookkeeper (petitioner's brother-in-law) may have been, we submit that there is implicit in the verdict a finding by the jury that petitioner had knowledge of the proved omissions from his reported income. The fact, if it be a fact, that not all of the excessive net worth increase arose from the precise sources of unreported income claimed by the Government would have no bearing on the admissibility of the net worth evidence.

Finally, it should be noted that petitioner is in no position to complain of the admission into evidence of the Government's net worth summary, since he neither made a motion to strike it at the conclusion of the evidence which he alleges established its impropriety nor made any objection to the trial court's instructions regarding it. (R. 209a).

3. The contention (Pet. 12–13, 16–19) that the evidence is insufficient to support the verdict is equally without merit.

Petitioner's 1947 return disclosed net income of $14,229.60. (R. 64b.) At the trial, his own evidence disclosed that he had realized, in addition, unreported income of either $19,734.43 (R. 181a–182a) or $17,146.39 (R. 148a–150a). In the petition it is admitted (Pet. 7) that he should have reported $32,652.78 rather than $14,229.60, the $18,423.18 discrepancy consisting of "specific errors and omissions" independent of the padded purchase costs. Since it is never incumbent on the prosecution to show the precise amount of tax evaded, and since petitioner's evi-

dence may be considered just as fully as that introduced by the Government (*United States* v. *Calderon*, 348 U. S. 160, 164), there is no need to speculate as to the weight the jury may have given to the Government's evidence tending to show that petitioner padded his purchase costs by $19,892.52 (*supra*, pp. 3–4). Regardless of the precise composition of the unreported income, it is admittedly substantial. It follows that the only question remaining for discussion is whether there was substantial evidence of petitioner's wilfulness. See *Rutkin* v. *United States*, 343 U. S. 130, 135. On this issue we think there can be no doubt. His fraudulent intent is amply demonstrated by the large number of substantial "errors", virtually all of them against the Government, appearing in the books maintained by petitioner's brother-in-law; by the omission from the books and income tax returns of $4,252.42 realized from sales and $4,334.52 of finance income; by the unreported income of $29,268.86 indicated by the net worth computations; by the gross discrepancies between the amounts claimed on petitioner's books and returns as the cost of cars and the true costs as shown by the Government's evidence; and by petitioner's conflicting explanations of these differences. See *supra*, pp. 4–5. We submit that the evidence was clearly sufficient to sustain the jury's verdict of guilty.

CONCLUSION

The decision of the court below is correct and presents no question warranting review. The petition for writ of certiorari should be denied.

Respectfully submitted,

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